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FILED

AUG 21 2012

Phil Lombardi, Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT NOF OKLAHOMA

Antoriio Wayne Sells # 448149 Vs. **Anita Trammel** Warden of the Mack Alford Correctional Center in Atoka County and the State of Oklahoma	**Case Number** 12 CV - 471 CVE PJC

MEMORANDUM OF LAW

COMES now, Antonio Wayne sells, the here in Petitioner, currently incarcerated in the Mack Alford Correctional Facility, in Stringtown, Oklahoma; and respectfully submits his Memorandum of Law in support of the foregoing and here to attached application for Writ of Habeas Corpus and gives to show the following reasons why same should be granted and this Conviction should be reversed and set aside.

PROPOSITION ONE

The eyewitness identification of Petitioner was conducted by arresting officer in an overly suggestive one-man line-up that egregiously violated Mr. Sells Rights to Due Process and a fair trial.

Standard of Review: The test for the sufficiency of the evidence…is whether, when viewed in the light most favorable to the State, any reasonable juror could have found the defendant guilty of all the essential elements of the charge beyond a reasonable doubt.

See U.S. Const. Amends. Six (6) Fourteen (14); Okla. Const. Art. Two (2) §7:

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Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d. 560 (1979).

At the most expansive view of the evidence in favor of the States Case. Which dealt with the eyewitness' identification of Petitioner Sells, which was questionable and high suspect due to several factors, the State only established a "SUSPICION" of Petitioners' guilt.

The eyewitness in this cause testified in Court that the Police Officer informed her that suspect Number Two (2) [Mr. Sells] was in the back seat of his patrol car. Whereupon she approached his vehicle and for the first time saw Mr. Sells in the back seat (sitting not standing) in the patrol car. Trial Transcripts, pages 147-150, and 165.

At trial and during Motions, the arresting officer testified in contradistinction to the eyewitness Preliminary Hearing Testimony, in that, the officer stated that the eyewitness approached his vehicle first and immediately identified petitioner. At this juncture this writer asks this Court to take judicial notice of the eyewitness' testimony in whole.

First, she described the incident including suspect number One (1) pulling a gun on her, then she collapsed to the ground. Suspect number One (1) then grabbing her by the hair and trying to cover her mouth to silence her; giving her an "opportunity to view " her second assailant, who was standing behind suspect number one (1) and did not display or indicate possession of having any type of weapons. From the descriptions given by eyewitness, the aledged victim (Ms. Bible), she lacked sufficient opportunity to observe her second assailant.

The officer's statement to eyewitness that suspect number two (2) was in his car irreparably influenced the eyewitness' identification. The United States Supreme Court in **Kirby v. Illinois**, 406 U.S. 682, 691, 92 S.Ct. 1877,1883, 32 L.Ed. 2d 411 (1972) ruled;

> **"...a pretrial eyewitness identification violates due process when it is so unnecessarily suggestive that it is conducive to irreparable mistaken identification."**

At this stage petitioner must quote from the same arguments advances in the State appellate Court that:[I]n **Archuleta v. Kerby**, 864 F.2d 709, 711 (10th Cir.1989);Cert. denied,409 U.S. 1084, the Tenth Circuit ruled:

> **"that when examining the Constitutionality of pre-trial identification procedures, the Courts must engage in a two-tier analysis. First, it must be determined if the identification procedure was unnecessarily suggestive."**

[If this Court accepts the eyewitness preliminary testimony, that suspect number two (2) was "in my car", by officer Abbey: Then some was highly improper and intentionally injected by Officer Abbey.]

If the procedure is determined to be unnecessarily suggestive, then the Court must weigh the corrupting influence of the overly suggestive procedure against the reliability itself. **Mason v. Brathwaite**, 432 U.S. 98.1114 (1977). In both **Manson** and **Neil v. Biggers**, 409 U.S. 188,199-200 (1972); the Supreme Court dictated the five factors for all Courts to use in evaluating the likelihood of misidentification:

> **1) The opportunity of the eyewitness to view the Criminal Suspect at the time of the Crime, ; 2) The eyewitness degree of attention, 3) The accuracy of the eyewitness prior description of the suspect., 4) the level of the certainty demonstrated by the witness at the confrontation; and 5) the time span between the criminal event and the confrontation. See also Hallmark v. Martin, 112 F. Supp. 2d 1122,1134(N.D. Okla. 2000).**

PROPOSITION TWO

The identification procedure used by the police in this particular case was indeed overly and unnecessarily suggestive as to petitioner sells, and most certainly conductive to irreparable mistaken identification by the alleged victim of petitioner in this case.

Only minutes after the incident, officer Abbey pulled up with a handcuffed Blackman in the backseat of his patrol car, and announced to the alleged victim that he had suspect number two (2) in custody in his patrol car. Ms. Bible, in her trial testimony agreed that she had no reason to doubt officer Ms. Abbey. (Tr.2 170)

PROPOSITION THREE

In **Goudeau v. State**, 637 P.2d 859,(Okl.Cr. 1981):

> **The appellant urged that the trial e Court erred in not suppressing Patsy Mann's in-court identification of him. The Goudeau appellant alleged that the acknowledgement of the show-up identification procedure by the trial court was in contravention of defendant's right to due process.**

See, **Stovaoll v. Denno**, 388 U.S. 293, 87S.Ct. (1967); 18 L.Ed. 2d 1199 (1967); also **Simmons v. United States**, 390 U.S. 377, 88 S.Ct. 967, 19 nL.Ed. 2d1247 (1968):

> **"For the proposition that [s]uch suggestiveness may lead to an irreparably mistaken identification."**

Also like in **Goudeau v. State**, 637 P.2d 859,(Okl.Cr. 1981):

> **"...even though the right to counsel may not have attached because the identification preceded the filing of charges."**

See also; **Kirby v. Illinois**, 406 U.S. 682 (1972), and **McDaniel v. State**, 576 P.2d 307 at 309 (Okl.Cr. 1978):

> **"the pre-trial identification process must be considered in such a way as to avoid any possibility of prejudice and to insure that any in-court identification is based on what the witness saw at the commission of the crime, rather than at the line-up.**

PROPOSITION FOUR

The crucial point here is that "there is no evidence of any kind of sufficient identification detail-provided by the aledge victim, prior to the police officer's statement to her that he had arrested" suspect number two (2) and had him in his car.The officer's self-serving testimony at the suppression hearing that Ms. Bible identification was immediate, if true, does not out weigh, her in-court testimony contradicting the officer.

Considering this argument, the petitioner here submits that the trial and appellate-courts rulings both failed to properly apply the standards designed in **Kirby** supra, to prevent even the possibility of prejudice (in this cause, it became a viable issue when the witness / victim admitted the before she went to the patrol car to identify petitioner, the police officer approached her and made extremely suggestive statements to her.

At trial Ms. Bibles, summary testimony was that she turned upon exiting her place of business and briefly observed two (2) black males wearing masks walking towards her and the smaller of the two men (suspect no.1) pulled a weapon and she immediately became frightened and collapsed to the ground. Suspect number one (1) then placed the gun in her face and ordered her to standup. Ms. Bible said that she became more hysterical and verbal – her assailant's broke and ran after trying to cover her mouth with his hand [suspect no. 1]. She then said that she got up and ran into another business, asking for someone to call the police.

Ms. Bible's testimony under,**Manson v. Brathwaite**, 432 U.S. 98 (1977) and **Neil v. Biggers**, 409 U.S. 188, 199-200 (1972); the Supreme Court set forth five(5) factors for Courts to use in evaluating the likelihood of misidentification. Under the first factor

1) **The opportunity of the eyewitness to view the criminal suspect, and;**
2) **the eyewitness's degree of attention,**
3) **the accuracy of his prior description of the criminal,**
4) **the level of certainty demonstrated at the confrontation**
5) **and the time between the crime and the confrontation.**

Against these factors is to be weighed the corrupting effect of the suggestive identification itself. It is apparent that the suggestive nature of the initial / identification process, it's inherent suggestiveness apparent that the State Courts Rulings were contrary to the law of the land.

Then see the two tier analysis standard announced in: **Archuleta v. Kerby**, 864 F.2d 709.at 711(10th Cir. 1989), cert. denied, 490 U.S. 1084 (1989):

> **"the courts must determine if the identification was unnecessarily suggestive then, if so , the court must weigh the corrupting influence of the overly suggestive procedure against the reliability of the identification itself.**

See also the Courts opinion rendered in **Hallmark v. Martin**, 112 F. supp. 2d 1122, 1134 (2000).

SUMMARY

The identification procedure used by the police in this case, especially given Ms. Bible's impression as testified to that for sure, petitioner was indeed suspect number two (2) by officer Abbey, was overly and unnecessarily suggestive. And led to the irreparable misidentification of this petitioner. Given factors surrounding the criminal episode itself and Ms. Bible's excited state of mind. Which surely affected the degree of her attention and her lack of proper opportunity to view the criminal suspect, at the time the crime was to have occurred. Therefore this petitioner prays that this court would grant his writ of habeas corpus and reverse his conviction and set aside the Judgment and sentence in this cause. It is so prayed.

Respectfully
Submitted,

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